



## **NATIONAL LABOR RELATIONS BOARD**

### **29 CFR Part 102**

### **RIN 3142-AA20**

## **Use of Videoconference Technology to Conduct Unfair Labor Practice and Representation Case Proceedings**

**AGENCY:** National Labor Relations Board.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The National Labor Relations Board (“NLRB,” “Agency,” or “Board”) seeks public input on the use of videoconference technology to conduct, in whole or in part, all aspects and phases of unfair labor practice and representation case hearings and on potential amendments to its procedural rules regarding the use of videoconference technology. The Board’s current Rules and Regulations provide for the taking of a single witness’s testimony via video in an unfair labor practice proceeding upon a showing of good cause based on compelling circumstances. During the COVID-19 pandemic, the Board, through adjudication, sanctioned entirely remote hearings in both unfair labor practice and representation cases. The Board has no intention to permanently replace in-person hearings with virtual hearings. To the contrary, once conditions permit, the Board intends to resume conducting in-person hearings. But, based on the Board’s experience during the pandemic, the Board is considering whether to retain virtual hearings as an option for future use. Accordingly, the Board solicits responses to targeted questions regarding, among other things, stakeholders’ experiences with remote hearings during the pandemic; the benefits and/or drawbacks of using videoconference technology to conduct remote hearings; and the need for, and content of, potential amendments to the Board’s rules regarding use of videoconference technology to conduct remote hearings.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. No late comments will be accepted.

**ADDRESSES:** You may submit comments on this proposed rule only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>. Follow the instructions for submitting comments.

Delivery—Comments may be sent by mail to: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. It is not necessary to mail comments if they have been filed electronically with

<http://www.regulations.gov>. If you mail comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-1940 (this is not a toll-free number).

Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD). Because of precautions in place due to COVID-19, the Board recommends that comments be submitted electronically or by mail rather than by hand delivery. If you feel you must hand deliver comments to the Board, hand delivery will be accepted by appointment only. Please call (202) 273-1940 to arrange for hand delivery of comments. Please note that there may be a delay in the electronic posting of hand-delivered and mailed comments due to the needs for safe handling and manual scanning of the comments. The Board strongly encourages electronic filing over mail or hand delivery of comments.

Only comments submitted through <http://www.regulations.gov>, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at <http://www.regulations.gov>.

The Board will post, as soon as practicable, all comments received on <http://www.regulations.gov> without making any changes to the comments, including any personal information provided. The website <http://www.regulations.gov> is the Federal

eRulemaking portal, and all comments posted there are available and accessible to the public. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the <http://www.regulations.gov> website. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

The Board requests that comments include full citations or internet links to any authority relied upon.

**FOR FURTHER INFORMATION CONTACT:** Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, DC 20570-0001, (202) 273-1940 (this is not a toll-free number), 1-866-315-6572 TTY/TDD.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### **A. Remote Testimony in Board Proceedings Pre-Pandemic**

The NLRB is an independent federal agency established in 1935 to promote workplace democracy and, in the words of former President Franklin Delano Roosevelt, “to foster the development of the employee contract on a sound and equitable basis.” For more than 85 years, the NLRB has been at the forefront of the effort to promote and protect the rights and obligations of employees, unions, and employers under the National Labor Relations Act (“the Act”). The NLRB achieves these objectives by carrying out two principal statutory functions: (1) conducting representation elections among employees to determine their wishes regarding union representation (“representation cases”); and (2) investigating and prosecuting alleged unfair labor practices by employers and unions (“unfair labor practice cases”).

Under the Act, the Board, when necessary, must provide fair and impartial evidentiary hearings to adjudicate issues raised in unfair labor practice and representation cases. *See* 29

U.S.C. 160(b) (requiring a notice of hearing upon issuance of an unfair labor practice complaint); *id.* 159(c)(1) (requiring “an appropriate hearing” if a question concerning representation exists); *accord* 5 U.S.C. 554 (due process standards for administrative adjudication under the Administrative Procedure Act). Administrative law judges presiding over unfair labor practice cases, and hearing officers presiding over representation cases, have historically conducted hearings in person.

With the advent of sophisticated, accessible, and high-quality videoconference technology in the broadband era, the Agency has taken several steps to integrate videoconferencing into representation and unfair labor practice proceedings. In 2008, the Board approved a two-year pilot program to test the use of video testimony in representation cases in limited circumstances involving remote witnesses, parties, or hearing officers, and/or multiple locations. *See* Pilot Video Testimony Program in Representation Cases, OM Memo 08-20 (Jan. 8, 2008). Midway through the pilot program, the Associate General Counsel for Operations reported that “few offices [had] utilized video testimony to obtain evidence” in representation cases; however, “[t]hose Regions with video testimony experience state that its use can be very helpful in controlled situations,” and “offices experienced no problems when taking video testimony.” Pilot Video Testimony Program in Representation Cases Mid-Term Report, OM Memo 09-43 (CH), at 1 (Mar. 16, 2009). Moreover, the Associate General Counsel observed that the use of video technology to obtain evidence during regional investigations of unfair labor practice charges could be appropriate in limited circumstances, subject to regional personnel consulting with the Division of Operations-Management. *Id.*

In 2011, the Agency made the pilot program permanent. *See* Video Testimony in Representation and Unfair Labor Practice Casehandling, OM Memo 11-42 (CH), at 1 (Mar. 30, 2011). In the same 2011 memo, the Acting General Counsel expanded the earlier pilot program by authorizing regional attorneys to use video technology to introduce witness testimony in contested unfair labor practice hearings, “where good cause is shown, compelling circumstances

exist and appropriate safeguards are in place.” *Id.* at 2–3 & n.3 (listing factors to consider before granting a request for video testimony). Consistent with this policy, in 2015, the Board, with judicial approval, affirmed the judge’s finding that the use of videoconferencing technology to obtain hearing testimony from a witness living abroad did not deny the respondent due process. *EF Int’l Lang. Sch., Inc.*, 363 NLRB No. 20, slip op. at 1 n.1, 3–5 (2015), *enforced*, 673 F. App’x 1, 3–4 (D.C. Cir. 2017). The Board rejected arguments that videoconference technology was insufficient to allow the judge to make credibility determinations, noting that “the videoconferencing technology used enabled [the judge’s] observation of the witness at all material times.” *Id.*, slip op. at 1 n.1; *see also MPE, Inc.*, 09-CA-084228, 2015 WL 400660, at \*1 (Jan. 29, 2015) (unpublished order) (finding that judge erred in refusing to allow video testimony from otherwise unavailable witness).

In 2017, the Board amended its Rules and Regulations to set standards for the taking of a single witness’s testimony in an unfair labor practice case via video transmission in an otherwise in-person hearing. The rule allows contemporaneous, remote witness testimony “[u]pon a showing of good cause based on compelling circumstances, and under appropriate safeguards.” 29 CFR 102.35(c). It delineates the process required for a party to apply to obtain testimony by videoconference, 102.35(c)(1), and offers a non-exhaustive list of appropriate safeguards to “ensure that the Administrative Law Judge has the ability to assess the witness’s credibility and that the parties have a meaningful opportunity to examine and cross-examine the witness,” 102.35(c)(2). The Board’s rules pertaining to representation hearings do not contain a corresponding provision, and, as of March 2020, representation hearings continue to be governed by the standards set forth in OM Memos 08-20, 09-43 (CH), and 11-42 (CH).

## **B. Remote Hearings During the COVID-19 Pandemic**

1. The COVID-19 pandemic, and related federal, state, and local guidance and orders, pushed the Board to quickly expand its videoconferencing capabilities and pivot to widespread use of remote hearings in both representation and unfair labor practice cases. In April 2020, at

the beginning of the pandemic, Regional Directors exercised their delegated authority under Section 3(b) of the Act to schedule representation case hearings through videoconference or teleconference. *See* COVID-19 Operational Status Update (Apr. 17, 2020), <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>. On May 11, 2020, the Board issued its decision in *Morrison Healthcare*, 369 NLRB No. 76 (2020), approving the use of videoconference technology to hear witness testimony at an all-remote hearing. The Board held that videoconference hearings in representation cases would be appropriate “on a showing of good cause based on compelling circumstances and under appropriate safeguards.” *Id.*, slip op. at 1. The Board further found that the COVID-19 pandemic constituted “compelling circumstances” warranting a remote preelection hearing in the case under review. *Id.*, slip op. at 2. As for appropriate safeguards, the Board left “it to the hearing officer in the first instance to impose appropriate safeguards, informed but not controlled by those listed in Sec[ti]on 102.35(c)(2),” which, as stated, governs remote testimony in unfair labor practice proceedings. *Id.*, slip op. at 1 n.2. In contrast, the Board held that a telephonic representation case hearing would be appropriate “only where compelling circumstances exist and no witness testimony is involved,” though the Board left open the possibility that parties could agree to a telephonic hearing. *Id.*, slip op. at 1, 2 & n.4.

In April 2020, the Board’s Division of Judges ordered that no in-person unfair labor practice hearings would be scheduled through May 31, 2020. On May 15, 2020, the Division of Judges announced that it would begin holding virtual hearings on unfair labor practice complaints effective June 1, 2020. On August 13, 2020, the Board issued its decision in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), resolving its first challenge to a judge’s decision to hold a hearing remotely in an unfair labor practice case. Guided by *Morrison*, the Board found “nothing in the Board’s Rules, or the Act, that precludes a judge or Regional Director from ordering a videoconference hearing in an unfair labor practice case, on a showing of good cause based on compelling circumstances and under appropriate safeguards.” *Id.*, slip op. at 1. Nor

does the Fifth Amendment’s Due Process Clause per se preclude conducting administrative hearings via videoconference. *Id.*, slip op. at 1 n.2. The Board further found that the judge did not abuse his discretion in finding the COVID-19 pandemic was a compelling circumstance justifying a remote hearing, nor in imposing appropriate safeguards informed but not controlled by those listed in Section 102.35(c)(2). *Id.*, slip op. at 1–2. The Board emphasized that the respondent could raise any non-speculative due process concerns with the trial judge in the first instance, or later on exceptions to the Board under Section 102.46 of the Board’s Rules and Regulations. *Id.*, slip op. at 2; *see also XPO Cartage, Inc.*, 370 NLRB No. 10 (2020) (denying respondent’s special appeal from judge’s order directing remote hearing); *Boeing Co.*, 10-CA-204795, 2020 WL 5204848 (Aug. 31, 2020) (unpublished order) (same).

In a May 2021 decision, the Board acknowledged the “evolving state of the pandemic,” including more widespread vaccinations and some jurisdictions returning to in-person hearings and trials. *Michael Cetta, Inc.*, 02-CA-142626, 2021 WL 1966555, at \*2 (May 14, 2021) (unpublished order). Nevertheless, the Board did not find “that conditions have improved so much . . . as to *mandate* a return to in-person hearings”; thus, it found, the judge did “not abuse[] his discretion in relying on the ongoing pandemic as a compelling circumstance necessitating a remote hearing” in that case. *Id.* (original emphasis).

2. During the early months of the pandemic, the Agency built an infrastructure to ensure that hearings could continue safely. The Agency acquired additional licenses and equipment necessary to conduct hearings remotely using videoconferencing technology, adding Zoom for Government to its software inventory as its primary remote hearing platform. The General Counsel and Division of Judges trained the Agency’s Regional staff and administrative law judges on using the technology in a trial setting. The Division of Judges established guidance and best practices for its remote hearings, including methods for sharing exhibits and *Jencks* statements,<sup>1</sup> managing witnesses and participants, and handling sequestration orders. To allow

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<sup>1</sup> *See Jencks v. United States*, 353 U.S. 657, 672 (1957).

for public access, the Agency determined that the Regional Offices, upon request, would issue non-participant observers a link to any hearing they wished to observe.

For unfair labor practice cases, the Agency also set up its “Courtroom Deputy” program, designed to assist judges and parties in remote hearings. Under that program, at the judge’s request, an Agency employee trained in the Zoom for Government platform is assigned to cases scheduled for hearing. That individual attends the pretrial conference, conducts practice sessions with the parties, admits parties, witnesses, and attendees to the hearing, troubleshoots technological issues, shares exhibits via the platform’s share screen function, handles the waiting room and breakout rooms, and otherwise assists the judge in ensuring that the hearing runs as smoothly as possible. The Agency screens and recuses the Courtroom Deputy from working on the case in any other capacity than as Courtroom Deputy. In *Michael Cetta, Inc.*, the Board rejected a challenge to the Courtroom Deputy program. 2021 WL 1966555, at \*2.

Beginning with the Board’s shift to remote hearings in Spring 2020 and through the end of Fiscal Year 2021, the Agency has conducted 207 unfair labor practice hearings and 487 representation case hearings via the Zoom for Government videoconferencing platform.

### **C. Remote Hearings and Trials at Other Federal Agencies and in the Federal Courts**

The NLRB is not the only federal agency that has used or is using videoconference technology in its hearings before and during the pandemic. Prior to the pandemic, some federal agencies conducted remote hearings, in whole or in part, by telephone or videoconference.<sup>2</sup> Since at least 2011, the Administrative Conference of the United States (ACUS) has analyzed the use of remote hearing technology in federal administrative adjudication and issued guidance and

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<sup>2</sup> See Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 FR 48789, 48795–96 (Aug. 9, 2011), available at <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>.



best practices for federal agencies.<sup>3</sup> Like the NLRB, other federal agencies transitioned to remote hearings on a wider scale in response to the pandemic and the need to comply with health and safety protocols.<sup>4</sup>

As for the federal courts, they, like the NLRB, have long provided for remote testimony of a single witness in an otherwise in-person hearing. Rule 43(a) of the Federal Rules of Civil Procedure states that “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” The comments to that rule, however, emphasize “[t]he importance of presenting live testimony in court.” Nevertheless, the pandemic also forced the federal courts to transition to remote proceedings. In March 2020, “the Judicial Conference of the United States [] temporarily approved the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 national emergency.”<sup>5</sup> Federal courts have even conducted remote civil jury trials.<sup>6</sup> The Judicial Conference has also permitted judges to authorize the use of teleconferencing to provide the

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<sup>3</sup> See, e.g., *id.*; Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 FR 75114, 75119–20 (Dec. 17, 2014), available at <https://www.acus.gov/recommendation/best-practices-using-video-teleconferencing-hearings>.

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 FR 36075, 36083–85 (July 8, 2021), available at <https://www.acus.gov/recommendation/virtual-hearings-agency-adjudication> (stating that use of virtual hearings in agency proceedings “expanded dramatically during the COVID-19 pandemic”). ACUS compiled and continues to update a list of agency issuances related to the COVID-19 pandemic, including those pertaining to virtual hearings. *Coronavirus (COVID-19) and Adjudication*, ACUS.GOV, <https://www.acus.gov/coronavirus-and-adjudication> (last updated Sept. 16, 2021).

<sup>5</sup> *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, USCOURTS.GOV (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

<sup>6</sup> *As Pandemic Lingers, Courts Lean Into Virtual Technology*, USCOURTS.GOV (Feb. 18, 2021), <https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology>.

public and media access to court proceedings.<sup>7</sup> Although some jurisdictions have returned to in-person proceedings in limited circumstances, the federal courts have not fully returned to pre-pandemic operations.<sup>8</sup>

## II. Information Requested

The Board expects that in-person hearings will again be the norm once they can be held safely. Nevertheless, given the Board's largely successful experience with remote hearings during the pandemic, the Agency is evaluating what role, if any, videoconferencing should play in its hearings going forward and is considering whether to amend its representation and unfair labor practice rules to incorporate further use of videoconference technology in the future.

Your responses to the following questions will help the Board evaluate its options and develop a more informed notice of proposed rulemaking if issued. The questions are not all-inclusive, and any supplemental information is welcome. Comments are not required to address every question, but, in responding, please identify the question you are responding to and explain the reasons for your answer.

The Board is seeking public comment on the following questions:

1. What role should videoconference technology play in unfair labor practice and representation case hearings after pandemic restrictions end? Should it remain available as an option for the parties to conduct a fully remote hearing, a partially remote hearing, and/or an in-person hearing with remote testimony only by specifically designated witnesses?

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<sup>7</sup> *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, USCOURTS.GOV (Apr. 3, 2020), <https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings>.

<sup>8</sup> *As COVID-19 Cases Fall, Juries Get Back to Work*, USCOURTS.GOV (May 27, 2021), <https://www.uscourts.gov/news/2021/05/27/covid-19-cases-fall-juries-get-back-work>. The United States Courts' website maintains COVID-19 related information for each jurisdiction. *Court Orders and Updates During COVID-19 Pandemic*, USCOURTS.GOV, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last updated Sept. 30, 2021); see also *Federal Courts Respond to COVID-19: Live Map*, BLOOMBERG LAW, <https://news.bloomberglaw.com/us-law-week/arguments-axed-access-limited-courts-respond-to-covid-19-map> (last updated Sept. 22, 2021).

2. Assuming the Board retains videoconference hearings as an option, what should the standard be for ordering one? Should it be at the discretion of the judge or Regional Director, or should there be a higher standard?
3. Should the agreement of the judge or Regional Director and all parties be required? If all parties do not consent, what would be the appropriate next steps to resolve the matter? Similarly, if all parties want a videoconference hearing, but the judge or Regional Director does not agree, what should be the appropriate next steps to resolve the matter?
4. Does the Board's use of videoconferencing present any technological or other barriers to participation in Board proceedings? If so, how might the Board attempt to mitigate those potential barriers?
5. How might the Board best accommodate the needs of videoconference hearing participants who require the services of an interpreter or translator?
6. In what ways could the NLRB improve its use or conduct of videoconference hearings, including best practices derived from your experiences in the federal courts, state courts, or other federal agencies, which could inform how the Board develops a rule?
7. Please provide feedback on the Agency's "Courtroom Deputy" program that provides technical assistance to judges to allow them to focus on the legal elements of the hearing. Should the Agency retain the program? Would you have concerns about the Agency contracting with third parties, including court-reporting companies, to provide the same technical assistance? Either way, what are your suggestions for improving the services provided?
8. Did or do you feel adequately prepared to use the videoconference technology in a trial setting?
9. If further rulemaking is desirable, should the Board adopt separate rules for the use of videoconferencing in unfair labor practice and representation case hearings? If so, what are the differences between the two types of hearings that separate rules should reflect?

10. If further rulemaking is desirable, should the rule provide for a mechanism to appeal or for other Board review of a decision to hold a hearing via videoconference, or is the mechanism provided for in Sections 102.26 and 102.67(c) of the Board's Rules and Regulations adequate?

11. In your experience with NLRB videoconference hearings during the pandemic, have any technology limitations or problems in videoconference hearings interfered with the conduct of the hearings?

12. Has the use of videoconference technology affected the ability to successfully engage in mediation and/or settlement discussions?

13. Is there sufficient public access to Agency proceedings in a virtual environment?

14. Are there any privacy, confidentiality, or security concerns linked to public access to virtual Agency proceedings? If so, how should the Board address those concerns?

Dated: October 26, 2021.

**Roxanne L. Rothschild,**

*Executive Secretary,*

*National Labor Relations Board.*

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